giving the accused the names of the official experts before the trial begins. The most that can be said against the statute is that possibly no opinion on some topics concerning which little is really known should be given the weight which the jury might attach to any opinion coming from men designated by the judge as suitable and disinterested experts. Such arguments should be addressed to the legislature. No doctrine of constitutional law is more frequently repeated than that the courts will not overthrow an act of the legislature simply because they deem it unwise.

Another ground on which the court bases its decision is that the statute in question transfers the power of choosing witnesses from the prosecuting attorney, an administrative officer, to a member of the judicial department, in violation of the provision of the state constitution for a separation of powers.[6] Comparing a theoretical analysis of the powers of government with the distribution of those powers by the state constitutions, it is apparent that legislative power (*e. g.* the veto) is entrusted to the governor. So the constitutions give the impeaching power, theoretically judicial, to the legislature. Furthermore, without express warrant in the usual state constitution, the judicial power of punishing contempt is exercised by the legislature,[7] while the courts exercise the legislative power of prescribing rules of practice and many theoretically administrative functions, such as appointing receivers to wind up the affairs of insolvent corporations, and administering estates of deceased persons. These are but a few of many illustrations which show that the distribution of powers is historical rather than analytical.[8] It is impossible definitely to assign every function of government to one of the three departments as a matter of logic, and it would be highly undesirable to do so as a matter of law.[9] There is a broad borderland of functions, which may be shifted from one department to another as circumstances require. Thus many powers formerly thought judicial[10] are now exercised by administrative officers or boards.[11] The power given by the Michigan statute to choose official experts resembles more closely the power to appoint referees than that to choose witnesses for one side. Hence, even if not analytically a judicial function, it is historically so.

RELIGIOUS BELIEF AS AFFECTING THE CREDIBILITY OF DYING DECLARATIONS. — One exception to the rule excluding hearsay evidence is the admission in a criminal prosecution for homicide of the dying declarations of the decedent as to the manner of his death. The essential requisite of such declarations is that they shall have been made when the declarant has lost all hope of life and is firmly convinced that he is

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[6] MICH. CONST., Art. IV.

[7] People *ex rel.* McDonald *v.* Keeler, 99 N. Y. 463; *In re* Gunn, 50 Kan. 155.

[8] See SALMOND, JURISPRUDENCE, 93–96.

[9] See GOODNOW, ADMINISTRATIVE LAW OF THE UNITED STATES, 24–42.

[10] Stone *v.* Elkins, 24 Cal. 125 (election contest). See State *ex rel.* Arpen *v.* Brown, 19 Fla. 563 (revoking license for cause).

[11] See Andrews *v.* Judge of Probate, 74 Mich. 278 (election contest); Hartford Fire Insurance Co. *v.* Raymond, 70 Mich. 485 (revoking license for cause).

about to die.[1] He may then be regarded as induced by the most powerful considerations to speak the truth. In the words of Eyre, C. B., "A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." [2] But the solemnity of the circumstances is no more an absolute guaranty of truthfulness than is an oath; and so if the decedent would not have been a competent witness in a court of justice his dying declarations are not admissible there.[3] Thus, as a lack of religious belief would originally disqualify any one as a witness, because of the religious nature of an oath, so the dying declarations of any one who did not believe in future rewards and punishments were inadmissible.[4] This theological qualification of testimonial capacity, however, has been removed, and a non-believer is no longer necessarily an incompetent witness.[5] Arguing from this premise a man's dying statements are probably no longer excluded on merely religious grounds.[6] The problem then arises, whether a decedent's peculiar religion or his lack of any religion may be shown to impeach his dying declarations. In jurisdictions that allow such impeachment of a living witness the answer must be affirmative.[7] It is submitted that the converse need not be true, and that a recent case was wrong in deciding that as want of religion could not be shown to impeach a living witness it was inadmissible to shake the credibility of dying declarations. *State* v. *Yee Gueng*, 112 Pac. 424 (Ore.). But though it is fair to argue that what will shake the stronger testimony will shake the weaker also, *non sequitur* that what will not shake the stronger will not shake the weaker. Three effective safeguards surround testimony that is given on the witness stand: the jury can observe the witness' demeanor; he is subject to cross-examination; and a more than possible result of a lie is a criminal prosecution for perjury. A dying declaration is subject to none of these tests. It is a hazardous form of evidence at best; it therefore should be received with caution, and its weight should be carefully calculated.[8] The thought of immediate death may strongly impel the ordinary Anglo-Saxon to speak the truth, but it certainly will not affect all minds alike. It is entirely logical for one to say, "I am about to die, therefore why tell the truth?" Indeed Stephen's History of the Criminal Law tells us that in the Punjab a native, mortally wounded, frequently makes a statement implicating all his hereditary enemies in his murder.[9] And whether a dying man is impelled towards truth or falsehood depends in large measure upon how he regards impending death. Surely the

[1] Queen *v.* Jenkins, 1 C. C. R. 187; Peak *v.* State, 50 N. J. L. 179; Tracy *v.* People, 97 Ill. 101.

[2] Rex *v.* Woodcock, Leach Cr. Cas. 397.

[3] See GREENLEAF, EVIDENCE, 16 ed., § 157.

[4] Rex *v.* Pike, 3 C. & P. 598; Donnelly *v.* State, 26 N. J. L. 463.

[5] See GREENLEAF, EVIDENCE, 16 ed., § 370.

[6] People *v.* Sanford, 43 Cal. 29; State *v.* Elliot, 45 Ia. 486; State *v.* Ah Lee, 8 Ore. 214. This conclusion however is not a necessary one. See WIGMORE, EVIDENCE, § 1443.

[7] People *v.* Sanford, *supra;* State *v.* Elliot, *supra.* See also analogous cases: State *v.* Baldwin, 15 Wash. 15; Lester *v.* State, 37 Fla. 382; Com. *v.* Cooper, 5 All. (Mass.) 495.

[8] People *v.* Kraft, 148 N. Y. 631; Queen *v.* Jenkins, *supra*, 193; Starkey *v.* People, 17 Ill. 17, 22.

[9] See 1 STEPHEN, HIST. CRIM. LAW, 448.

dying declarations of a man impressed with a firm belief of future accountability are entitled to greater credence than those of a man with no sense of religious responsibility.[10]

PERSONAL JURISDICTION OVER RESIDENTS BY SUBSTITUTED SERVICE. — The situations in which jurisdictional difficulties are presented may generally be classified as follows: (1) A court in state A attempts directly to affect the title to property in state B; (2) a court in state A attempts to affect the title to property in state B when a person with an existing right in the title is in state A; (3) a court in state A attempts directly to affect the rights of a person in state B; (4) a court in state A attempts to affect the rights of a person in state B who owns property in state A.

In (1) the court clearly has no jurisdiction.[1] In (2), however, it can incidentally affect the title by compelling action on the part of a person over whom it has jurisdiction.[2] (4) is analogous to (2), since the court, by acting on the title to property over which it has jurisdiction, can incidentally affect the rights of a non-resident.[3] Proceedings under this class may be either strictly *in rem*,[4] or *quasi in rem*.[5] (3) corresponds to (1), but is not so easily disposed of. The general rule is that personal jurisdiction without consent can be acquired only by personal service within the state. It is almost universally applied to non-resident foreigners.[6] The assumption by the English courts of jurisdiction over foreigners on substituted service when authorized by statute, is due to the supremacy of Parliament, and is in little danger of imitation in this country.[7] Even in England the jurisdiction of a foreign court in such a case is denied.[8] Acquiring jurisdiction over foreign corporations by serving their agents within the state is not an exception to the general rule, since it is based on consent,[9] which is a recognized basis for personal jurisdiction.[10] The principle that personal jurisdiction, once acquired, continues through all proceedings which form part of the same litigation is also no exception.[11]

There is, however, a dispute whether there is not a real exception in the case of residents of the state. In many decisions on the question of personal jurisdiction over non-residents, the language is broad enough

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[10] Nesbitt *v.* State, 43 Ga. 238; Goodall *v.* State, 1 Ore. 333; Carver *v.* United States, 164 U. S. 694, 697.

[1] See WHARTON, CONFLICT OF LAWS, §§ 273, 274, 278.

[2] Massie *v.* Watts, 6 Cranch (U. S.) 148. See 20 HARV. L. REV. 382.

[3] Arndt *v.* Griggs, 134 U. S. 316.

[4] Huling *v.* Kaw Valley Railway & Improvement Co., 130 U. S. 559.

[5] Hogle *v.* Mott, 62 Vt. 255. See Pennoyer *v.* Neff, 95 U. S. 714. In all proceedings *in rem* reasonable notice is necessary to satisfy constitutional requirements. Roller *v.* Holly, 176 U. S. 398.

[6] Pennoyer *v.* Neff, *supra;* Eliot *v.* McCormick, 144 Mass. 10; Buchanan *v.* Rucker, 9 East 192.

[7] See 24 HARV. L. REV. 318.

[8] Schibsby *v.* Westenholz, 6 Q. B. 155; Buchanan *v.* Rucker, *supra.*

[9] St. Clair *v.* Cox, 106 U. S. 350; Gibbs *v.* Queen Insurance Co., 63 N. Y. 114.

[10] Jones *v.* Merrill, 113 Mich. 433; Copin *v.* Adamson, 9 Ex. 345. See Rousillon *v.* Rousillon, 14 Ch. D. 351, 371.

[11] Burns *v.* Belknap, 22 Vt. 419; Fitzsimmons *v.* Johnson, 90 Tenn. 416.